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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANDREW G. ARRABITO,

Cross-Complainant and Respondent,

v.

GENE CHAFFIN et al.,

Cross-defendants and Appellants.

D074247

(Super. Ct. No. 37-2016-00009605-
CU-CL-CTL)

APPEAL from a judgment of the Superior Court of San Diego County,
Timothy B. Taylor, Judge. Reversed and remanded with directions.

Purdy & Bailey, Charles E. Purdy IV and Micah L. Bailey for Cross-defendants
and Appellants.

Ravin Glovinsky, William W. Ravin and Jason L. Glovinsky for Cross-
Complainant and Respondent.

I.

INTRODUCTION

Respondent Andrew G. Arrabito brought a cross-complaint against Gene Chaffin, a limited liability company owned by Chaffin called Santee Saloon, LLC (Santee Saloon) (collectively "appellants"), and a limited liability company that Arrabito and Chaffin partially owned called BNS Brewing & Distilling Co., LLC (BNS).¹ Arrabito owns 41.25 percent of BNS, which he cofounded with his friend, Wes Richey. Chaffin initially owned a two percent interest in BNS, and obtained an additional 52.25 percent interest in BNS by way of an agreement with Richey.

As relevant to this appeal, Arrabito brought a claim for breach of fiduciary duty against Chaffin as well as a claim for unjust enrichment and the imposition of a constructive trust against Santee Saloon.² The trial court held a bench trial during which the court received evidence that, shortly after his removal as BNS's manager, Richey purported to enter into a security agreement with Chaffin on behalf of BNS to secure \$377,152.07 in debt that BNS owed to Chaffin. Chaffin assigned his interest in the security agreement to Santee Saloon and Santee Saloon obtained the bulk of BNS's assets by way of a lien sale premised on the security agreement.

¹ JPMorgan Chase brought the underlying complaint against Arrabito, Chaffin, and BNS to collect on a promissory note entered into between Chase and BNS (Chase Note). The claims in the underlying complaint were resolved by way of settlement prior to the trial in this case. That complaint is not relevant to this appeal.

² Arrabito stated that he asserted the constructive trust cause of action "in right of BNS." In addition, Arrabito brought several claims against BNS that are not relevant to this appeal.

The trial court issued a statement of decision finding that the security agreement was invalid because it had not been signed by a person having the authority to bind BNS. The court further found that the lien sale was invalid and that Chaffin, as a majority owner of BNS, had breached fiduciary duties owed to Arrabito as a minority owner of BNS, by effectuating the sale. The court also noted that Arrabito had made \$148,000 in capital contributions to BNS, and determined, without further explanation, that Arrabito was entitled to recoup the total amount of his capital contributions in damages due to Chaffin's breach of fiduciary duty. The court subsequently entered a judgment against Chaffin and Santee Saloon for \$148,000.³ The trial court refused to impose a constructive trust or other equitable remedy on Santee Saloon's assets.

On appeal, appellants contend that there is not substantial evidence to support the trial court's finding that Chaffin breached his fiduciary duties to Arrabito. Appellants further contend that Arrabito failed to present substantial evidence that any such breach proximately caused Arrabito to suffer damages, since the undisputed evidence in the record demonstrated that BNS had no value as of the date of the lien sale.

We assume for purposes of this decision that there is substantial evidence that Chaffin breached his fiduciary duties to Arrabito by effectuating the lien sale. However, in order to establish a claim for breach of fiduciary duty, Arrabito was required to present evidence that Chaffin's breach proximately caused him to suffer damages. (See, e.g.,

³ While Arrabito did not name Santee Saloon as a defendant in his breach of fiduciary duty claim asserted in his cross-complaint, in its statement of decision, the trial court stated that "Chaffin and Santee Saloon . . . are one and the same." Appellants raise no claim on appeal with respect to this finding.

Gutierrez v. Girardi (2011) 194 Cal.App.4th 925, 932 (*Gutierrez*) [listing elements of breach of fiduciary duty as including " 'damage proximately caused by the breach' "].) While the trial court found that Arrabito had made capital contributions to BNS totaling \$148,000, *the bulk of these contributions occurred in 2012 and early 2013*,⁴ and the trial court did *not* find that Arrabito's investment in BNS was worth \$148,000 *at the time of the lien sale in February 2016*. Indeed, Arrabito presented *no* evidence as to the value of his interest in BNS as of the time of the lien sale. In contrast, appellants presented expert testimony that BNS had a negative value as of the date of the lien sale. The expert testified both that BNS had not shown "any profit" during its entire period of operation, and that its liabilities exceed its assets by approximately \$240,000 as of the time of the lien sale. Further, the trial court expressly found appellants' expert "credible."

Under these circumstances, we conclude that the record does not contain substantial evidence that Chaffin's breach of fiduciary duty caused Arrabito to suffer \$148,000 in damages. Simply put, a party is not entitled to recover damages for a breach of fiduciary duty for losses resulting from a failed investment where the party's losses are not caused by the breach of a fiduciary duty but rather, by events that preceded the breach. Accordingly, since Arrabito failed to present evidence of a required element of his breach of fiduciary duty claim—i.e., that Chaffin's breach proximately caused

⁴ To be precise, Arrabito transmitted exhibits to this court indicating that, in 2012 and early 2013, Arrabito wrote checks to BNS totaling \$143,000. The exhibit containing a copy of the check for Arrabito's remaining \$5,000 contribution to BNS was not transmitted to this court and there is no other evidence in the record by which this court could determine when Arrabito made this contribution. (See fn. 9, *post*.)

Arrabito to suffer damages—we reverse the judgment and remand the matter to the trial court with directions to enter judgment in favor of appellants.

II.

FACTUAL BACKGROUND⁵

A. *The formation of BNS*

In 2012, Arrabito and Richey formed BNS for the purpose of operating a brewery and distillery. Arrabito made a series of capital contributions to BNS totaling \$148,000. All, or nearly all, of these contributions were made in 2012 and early 2013. (See fn. 9, *post.*)

B. *The initial operation of BNS*

Chaffin, a licensed contractor,⁶ met Richey in December of 2012 and agreed to construct a brewery, distillery, and tasting room for BNS. Chaffin completed the

⁵ Appellants' opening brief fails to provide proper citations to the record in numerous instances. For example, page nine of the brief, which describes BNS's operations in 2013, does not contain a *single* citation. Counsel's failure to provide appropriate citations prevented this court from locating relevant portions of the record expeditiously and wasted judicial resources. Counsel is admonished in the future to comply with the California Rules of Court requiring that each brief "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).)

In addition, we emphasize that this court has independently reviewed the record and disregarded any statements in appellants' opening brief that are unsupported by the record.

⁶ It appears to be undisputed that Chaffin was a licensed contractor at the time of his construction of the brewery, although this fact is not entirely clear from the record. In his brief on appeal, Arrabito describes Chaffin as a "licensed contractor." Chaffin may no longer be a licensed contractor. When asked at trial about his "interesting career," Chaffin agreed that, "for a while," he had been a "licensed contractor."

construction without entering into a written contract or requiring a deposit. Chaffin's unpaid invoices to BNS on the construction project amounted to approximately \$156,000.

In June 2013, Richey, Arrabito, Tom Paden, Dan Jensen, and Chaffin signed an operating agreement for BNS (Operating Agreement). Pursuant to the terms of the Operating Agreement, Richey was BNS's manager. The Operating Agreement listed the following membership interests in BNS: Richey, 52.25 %; Arrabito, 41.25 %; Paden, 2.5 %; Jensen, 2.0 %; Chaffin, 2.0 %.

Chaffin testified that he made several loans to BNS in 2013, including a loan in the amount of \$110,000, as the trustee of his parent's trust, and additional loans of \$25,000 and \$6,000 to help BNS "open [its] doors" in June of 2013.

C. The January 2015 Note

On January 6, 2015, Richey signed a promissory note on behalf of BNS, and individually, in favor of Chaffin for \$377,152.07 (January 2015 Note). Chaffin testified that this amount represented a consolidation of previous amounts that BNS owed to him.⁷ The January 2015 Note called for monthly interest payments in the amount of \$3,142.93, and a balloon payment of the balance due on August 1, 2016.

⁷ When asked at trial why Richey had agreed to sign the January 2015 Note in an individual capacity, Chaffin responded:

"I guess he felt obligated to. He didn't really need to. The company owed the money, and it looks like he considered himself personally liable for it."

D. *Richey's removal as BNS's manager*

On February 9, 2015, Chaffin, Richey, Paden, and Jensen, held a meeting at which Chaffin, Paden and Jensen voted to remove Richey as BNS's managing member due to a variety of improper behaviors, including misuse of a company credit card and the improper use of company resources for personal items. Chaffin, Paden, and Jensen voted to install Paden as the interim manager of BNS.

E. *The Security Agreement*

Notwithstanding his removal as BNS's manager, on March 5, 2015, Richey signed a security agreement (Security Agreement), purportedly on behalf of BNS, to give Chaffin a lien on BNS's assets as collateral for the January 2015 Note. Richey did not have the authority to sign the agreement on BNS's behalf, given his removal as BNS's manager the previous month.

F. *Chaffin acquires Richey's interest in BNS*

On that same day, March 5, 2015, Richey and Chaffin entered into an agreement (Richey / Chaffin Transfer Agreement) whereby Richey transferred his 52.25 percent membership interest in BNS to Chaffin. In exchange, Chaffin released Richey from personal liability on the January 2015 Note.⁸ In addition, Chaffin agreed to use his best

⁸ The Security Agreement expressly provided that BNS remained obligated on the January 2015 Note to Chaffin.

efforts to obtain releases for Richey with respect to various other BNS related obligations, including those pertaining to BNS's real property lease and the Chase Note.⁹

G. *Chaffin forms Santee Saloon*

In April 2005, Chaffin formed Santee Saloon.

H. *Chaffin becomes manager of BNS*

By September 2015, Chaffin was the manager of BNS.

I. *Chaffin effectuates a lien sale of BNS's assets premised on the Security Agreement and the January 2015 Note*

BNS made only a single payment of \$3,142.93 on the January 2015 Note. On January 6, 2016, Chaffin assigned his rights under the January 2015 Note and the Security Agreement to Santee Saloon. On January 16, 2016, Chaffin wrote to Arrabito, Paden and Jensen advising them that he was "no longer willing to feed the alligator known as BNS"¹⁰ and that he would, therefore, foreclose under the Security Agreement by effecting a sale of "all of the equipment that is not attached to the building."

Chaffin hired a liquidator to conduct the sale. On February 2, 2016, the liquidator held a lien sale of BNS's assets. At the sale, Chaffin / Santee Saloon made a credit bid of \$70,000, and Santee Saloon obtained virtually all of BNS assets.

⁹ The trial court's statement of decision notes that Chaffin ultimately paid \$46,000 to settle the lender's claim on the Chase Note, without contribution from Arrabito.

¹⁰ Chaffin testified that he contributed an additional \$212,000 to BNS between March 2015 and February 1, 2016.

J. *BNS's value as of the date of the lien sale*

As discussed in greater detail, in part III.A.4, *post*, the only evidence presented at trial was that BNS had a negative value as of the date of the lien sale.

K. *Chaffin invests in Santee Saloon after its acquisition of BNS's assets*

Chaffin invested approximately \$500,000 in Santee Saloon after it acquired the BNS assets at the lien sale.

III.

DISCUSSION

A. *The trial court's damage award is not supported by substantial evidence*

Appellants maintain that the trial court's finding that Arrabito is entitled to \$148,000 in damages is not supported by substantial evidence. Specifically, appellants contend that, even assuming Chaffin breached his fiduciary duties to Arrabito by conducting an invalid lien sale, Arrabito failed to present evidence that such breach proximately caused Arrabito to suffer any damages.

1. *Substantial evidence standard of review*

" 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citation] . . . Inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence. [Citations.] . . . [¶] The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. [Citation.]" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651–652.)

2. *The trial court's statement of decision*

The trial court's statement of decision resolved "32 principal controverted issues," posed by the parties in their Joint Trial Readiness Report. As applicable to this appeal, the court found that "[t]he Security Agreement was invalid because it was not signed by anyone with authority to bind BNS," and that, as a result, "[t]he lien sale was invalid." The court further ruled that Chaffin had breached his fiduciary duties to Arrabito by "conduct[ing] the lien sale" ¹¹

With respect to damages, the trial court ruled as follows:

"If Chaffin did breach his fiduciary duties to Arrabito, to what damages is Arrabito entitled. **\$148,000.00**. This is the sum of Ex. 1, Ex. 2, Ex. 6, and Ex. 7.^[12] The court did not find the other damages evidence (e.g. Exs. 3 and 9)^[13] reliable. The court

¹¹ As noted in part I, *ante*, we assume for purposes of this decision that there is substantial evidence to support the trial court's finding in this regard.

¹² Exhibits 1, 2, and 6 are checks from Arrabito to BNS totaling \$143,000 dated September 18, 2012, December 19, 2012, and April 1, 2013, respectively. Neither party transmitted Exhibit 7 to this court. However, when asked to describe Exhibit 7 at trial, Arrabito stated, "It is a check for more loans."

¹³ Arrabito described Exhibit 3 as "receipts that I used [*sic*] my personal card that would be a loan to the business, as was discussed with Wes Richey."

Exhibit 9 is an e-mail dated Nov 12, 2013 from Richey to Arrabito that stated that in relevant part:

"The money that is owed to you is in your folder in the office filing cabinet:

- The receipts accumulated
- \$25K loan
- \$25K loan
- \$25K loan
- \$5K loan"

characterizes the entire \$148,000.00 as capital. This is in light of the complete absence of reliable, contemporaneous evidence that Exs. 2, 6 and 7 were intended as debt rather than additional equity infusions."

The trial court also found that Santee Saloon had unjustly retained BNS's assets as a result of the invalid lien sale. However, the trial court ruled that it would not be proper to impose a constructive trust or other equitable remedy in favor of BNS given the "substantial further capital contributions by Chaffin (both before and after the invalid lien sale) and Arrabito's failure to mitigate"14

3. *Governing law*

"The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of the fiduciary duty; and (3) *damage proximately caused by the breach.*" (*Gutierrez, supra*, 194 Cal.App.4th at p. 932, italics added; see also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 ["The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, breach of fiduciary duty, and damages"].)

Our Supreme Court outlined generally applicable principles of tort damages in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 551:

"Compensatory damages are moneys paid to compensate a person who 'suffers detriment from the unlawful act or omission of another' (Civ. Code, § 3281), and the measure of damages generally recoverable in tort is 'the amount which will compensate for all the

14 The trial court stated in several places in its statement of decision that it was "set[ting] aside the invalid lien sale." However, the trial court expressly declined to order Santee Saloon to return BNS's assets to BNS or otherwise impose a constructive trust or other equitable remedy on Santee Saloon's assets.

detriment proximately caused' by the tort (*id.*, § 3333). Civil Code section 3282, in turn, defines 'detriment' as 'a loss or harm suffered in person or property.' "

The "out-of-pocket" measure of tort damages, frequently discussed in the context of fraud claims, "restores a plaintiff to the financial position he enjoyed *prior to the fraudulent transaction*, awarding the difference in actual value between what the plaintiff gave and what he received." (*Fragale v. Faulkner* (2003) 110 Cal.App.4th 229, 236 (*Fragale*), italics added.)¹⁵ Tort damages recovered under this theory are based on out-of-pocket losses suffered by a plaintiff *as of the time of the commission of the tortious act giving rise to an assertion of liability*. (See *Salahutdin v. Valley of California, Inc.* (1994) 24 Cal.App.4th 555, 568 [stating that where a defendant commits fraud in connection with a transaction, " 'out of pocket' measure of damages, which are usually calculated *at the time of the transaction*" (italics added)]; *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1165 (*Persson*) [discussing the "out-of-pocket loss rule," and stating that plaintiff "was entitled to recover the difference, if any, between the actual value of the interest with which he parted (his shares in the corporation) and the actual value he received (\$1.4 million)"].)

For example, in *Persson*, the plaintiff (Persson) and the defendant (Nokes) jointly owned a corporation (Smart Inventions). (*Persson, supra*, 125 Cal.App.4th at p. 1146.)

¹⁵ We focus on out-of-pocket damages because Arrabito contends that the trial court's award of damages may be affirmed to compensate him for his " 'out of pocket' losses" under *Fragale*.

As noted in part III.A.2, *ante*, it is undisputed that the trial court declined to award any equitable remedies such as a constructive trust over Santee Saloon's assets.

Persson and Nokes entered into a buyout agreement pursuant to which the corporation redeemed all of Persson's shares. (*Ibid.*) Persson brought a fraudulent concealment claim against Nokes based on Nokes's failure to disclose certain information material to Persson's evaluation of the price at which he was willing to redeem his shares. (*Id.* at pp. 1165–1167.) "After hearing extensive expert testimony on the value of Smart Inventions *as of the date of the transaction*," the jury awarded Persson \$218,000. (*Id.* at p. 1165, italics added.) The *Persson* court stated that "[t]he jury's finding was supported by the evidence," citing expert testimony pertaining to the value of Smart Inventions "*at the time of the transaction*," (*ibid.*, italics added) that "support[e]d the conclusion that Persson's shares, at the time of the sale, were worth more than the amount he received for them—anywhere from \$168,250 more to \$2.9 million more." (*Id.* at p. 1166.) Thus, in *Persson*, in assessing the amount of damages that the plaintiff had suffered, the court examined the plaintiff's losses as of the date on which the defendant fraudulently concealed information in connection with the share redemption transaction.

4. *The record does not contain any substantial evidence to support the trial court's finding that Chaffin's act in conducting a lien sale and obtaining BNS's assets for Santee Saloon caused Arrabito to suffer \$148,000 in damages*

Other than stating that Arrabito had made capital contributions to BNS totaling \$148,000, the trial court did not explain the basis for its determination that Chaffin's act in conducting a lien sale and obtaining BNS's assets for Santee Saloon proximately caused Arrabito to suffer \$148,000 in damages. Importantly, the trial court did *not* find that Arrabito's investment in BNS was worth \$148,000 *at the time of the lien sale*, the

proper date on which to measure Arrabito's "out-of-pocket" losses, under the case law discussed above. (*Fragale, supra*, 110 Cal.App.4th at p. 236.)

Further, the trial court found appellants' valuation expert, Tony Yip, "credible." Yip testified that BNS "consistently show[ed] losses," throughout its entire period of operation and that BNS had *no* value as of the time of the lien sale. Specifically, in its statement of decision, in discussing the evidence presented, the trial court stated the following:

"The third defense witness, Tony Yip, CPA, was called after the noon recess. He was asked to provide opinions regarding the valuation of BNS and Santee Saloon, as well as opinions regarding how much Mr. Chaffin has contributed to the enterprise. BNS and Santee Saloon were and are not profitable. *BNS was worth \$0 on [the date of the lien sale]. No track record of profitability. 'Upside down' to the tune of \$240,000.* In other words, liabilities exceeded assets. Santee Saloon not profitable yet. No demonstrated track record. Based solely on the balance sheet, equity value of Santee is \$318,000.00. Chaffin has contributed \$727,000 - about \$300,000 of it in loans.

"Cross: valuation methodologies; damages analyses. Ex. 51.^[16]"
(Italics added.)

The trial court further stated, "Mr. Yip was credible and was not seriously undercut on cross."

In addition, Yip's testimony was entirely consistent with evidence that BNS had continuously experienced financial difficulties throughout its entire existence. For example, Jensen, who owned a 2% membership interest in BNS and worked as a brewer

¹⁶ Exhibit 51 constitutes a balance sheet for Santee, Saloon LLC as of July 31, 2017.

at BNS, testified that BNS frequently experienced cash flow problems that impaired his ability to order supplies to produce beer. He also testified that BNS experienced financial difficulties in late 2014 that caused it to have difficulty paying its bills. In addition, Jensen explained that he had been asked on a few occasions not to cash his paycheck. Jensen also testified that he had contributed \$20,000 to BNS and that he never received any return on his investment.¹⁷

Yip's testimony was also consistent with other undisputed testimony pertaining to BNS's value as of the date of the lien sale. Specifically, Chaffin testified that the assets of BNS that were secured by the Security Agreement were worth less than the approximately \$377,00 that BNS owed Chaffin. There is no contrary evidence in the record.

Arrabito failed to present *any* evidence as to the value of either BNS or his interest in BNS as of the date of the lien sale. Indeed, Arrabito does not argue on appeal that BNS had *any* positive value as the date of the lien sale. Instead, Arrabito contends:

"In the case of a tort by a fiduciary . . . a plaintiff is entitled to 'out of pocket' losses, i.e. *what the plaintiff contributed to the venture*. (*Fragale*, [*supra*, 110 Cal.App.4th at pp. 236–237]; see also *CACI* 1923, and *Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1582 [*(Michelson)*].)" (Italics added.)

However, none of the authorities that Arrabito cites support the italicized proposition. On the contrary, they all support the notion that Arrabito could recover his out-of-pocket losses as measured by the value of his interest in BNS *at the time of*

¹⁷ The trial court also expressly found Jensen to be "credible."

Chaffin's breach of fiduciary duty in conducting the lien sale. (See *Fragale, supra*, 110 Cal.App.4th at p. 236 ["The out-of-pocket measure restores a plaintiff to the financial position he enjoyed *prior to the fraudulent transaction*" (italics added)]; CACI 1923 Use Note [states the same]; *Michelson, supra*, 29 Cal.App.4th at p. 1582 ["Recovery for damages based upon breach of fiduciary duty is controlled by Civil Code section 3333,^[18] the traditional tort recovery"].) Arrabito has not cited, and our own research has not uncovered, any cases supporting the proposition that Arrabito advances in his brief—namely, that out-of-pocket losses may be measured *by the amount of money a party has contributed to a venture*, irrespective of the value of the party's investment in that venture as of the date of the defendant's tortious act.

None of the other arguments that Arrabito advances in an attempt to salvage the trial court's damage award is persuasive. Arrabito notes that Chaffin invested additional capital into Santee Saloon after acquiring BNS's assets and argues, "If BNS was worth Chaffin's additional \$500,000, its loss was worth the \$148,000 Arrabito had contributed." We disagree. Chaffin's investment in Santee Saloon *after* the date of the lien sale does not demonstrate the value of BNS *as of* the date of the lien sale. Chaffin was not purchasing BNS, and the amount that Chaffin invested in a new enterprise, Santee Saloon, does not establish anything about his assessment as to the value of BNS.

¹⁸ Civil Code section 3333 provides:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Arrabito also contends that Yip testified that "a plaintiff's damages may be determined by the amount he or she invested without regard for the value of what the plaintiff invested in." Yet, the relevant portion of Yip's testimony merely supports the proposition that a plaintiff in a securities fraud case is entitled to recover out-of-pocket losses, i.e., the difference between the price paid for the securities and the value of the security.¹⁹ (See *Fragale, supra*, 110 Cal.App.4th at p. 236 [explaining that "out-of-

19 The relevant portion of Yip's testimony stated:

"[Arrabito's counsel:] Analysis of a plaintiff's damages, though, is typically a different kind of enterprise [than valuing a business], isn't it?

"[Yip:] It is — you have to give me a little bit more specifics. Can you ask the question —

"[Arrabito's counsel:] I'd be happy to —

"[Yip:] Because there are various type cases [that] have various type[s] of legal remed[ies]. So[,] I can't answer that in general.

"[Arrabito's counsel:] Let's talk about the various types of cases and the various types of remedies.

"[Arrabito's counsel:] Are you familiar with . . . security fraud cases?

"[Yip:] I know what they are.

"[Arrabito's counsel:] Well, let's suppose someone has been defrauded in the purchase or sale of a security — purchase of a security, right, paid a million dollars for a security, it turns out to only be worth \$100,000. You wouldn't value his damages based upon the actual value of the business, would you?

"[Yip:] Let me make sure I understand your question. You are describing a situation where somebody purchased some securities, but it was — the person was defrauded.

"[Arrabito's counsel:] Or for whatever reason overpaid.

"[Yip:] Right. In that case, the measurement damage would not be based on the actual value of the securities. I agree with you.

pocket" measure of damages results in an award to the plaintiff of an amount equal to "the difference in actual value between what the plaintiff gave and what he received"].) Yip's testimony does not support the proposition that a plaintiff may recover the amount by which the value of a security decreased in value *before* the defendant's fraud. Thus, Yip's testimony does not support the proposition that Arrabito may recover decreases in the value of his investment in BNS that occurred *before* Chaffin's breach of fiduciary duty.

Arrabito also states that Chaffin recognizes that "the focus of an award of damages is the quantification of detriment suffered by a party." (Citing *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 835.) He cites Civil Code section 3333²⁰ and notes that a plaintiff may recover all "proximately caused damages" from a defendant's breach of fiduciary duty. We have no disagreement with either point. However, as discussed above, detriment cannot be based on losses that occurred *prior* to date of the breach of fiduciary duty, and there is no evidence that a breach of fiduciary duty proximately caused investment losses that *predated* the breach.

"[Arrabito's counsel:] It would be based on the loss to the plaintiff, correct?"

"[Yip:] Correct."

20 Civil Code section 3333 provides:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

Finally, Arrabito argues that "the [trial] court decided, and Chaffin does not dispute, Arrabito's investment of \$148,000 in BNS was lost when Chaffin conducted the foreclosure sale." As noted above, the trial court did *not* find that Arrabito's interest in BNS was worth \$148,000 as of the time of the lien sale. To the contrary, the court specifically found that "*BNS was worth \$0 on [the date of the lien sale]. . . . 'Upside down' to the tune of \$240,000.*" In addition, while Chaffin does not dispute that Arrabito lost \$148,000, he does dispute that that Arrabito's loss was proximately caused by the lien sale. As Chaffin properly contends:

"Here, though Arrabito lost his investment of approximately \$148,000 — just like all the other investors, said damages were [not] proximately caused . . . by any breach of fiduciary duty by Chaffin, . . . because, at the time of the auction, the company had absolutely no value, according to unrebutted and respected expert testimony at trial." (Some capitalization omitted.)

In sum, Arrabito does not contend that there is any evidence that his investment in BNS was worth \$148,000 at the time of the lien sale, and he points to no authority supporting the proposition that a plaintiff may recover, in damages, investment losses that occur *prior* to a defendant's breach of fiduciary duty. Accordingly, we conclude that the trial court erred in determining that Arrabito is entitled to \$148,000 in damages. We further conclude that Arrabito failed to present substantial evidence of a necessary element of his breach of fiduciary duty cause of action, i.e., "damage proximately caused by the breach." (*Gutierrez, supra*, 194 Cal.App.4th at p. 932.)

B. *The judgment must be reversed and the matter remanded to the trial court with directions to enter judgment in favor of appellants*

In *Acqua Vista Homeowners Assn. v. MWI, Inc.* (2017) 7 Cal.App.5th 1129 (*Acqua Vista Homeowners Assn.*), this court discussed the proper disposition for an appellate court to direct in a case, such as this, in which a reversal is " 'based on insufficiency of the evidence.' " (*Id.* at p. 1161, quoting *Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805 (*Frank*)). We explained:

" ' "When the plaintiff has had full and fair opportunity to present the case, and the evidence is insufficient as a matter of law to support plaintiff's cause of action, a judgment for defendant is required and no new trial is ordinarily allowed, save for newly discovered evidence. . . . Certainly, where the plaintiff's evidence is insufficient as a matter of law to support a judgment for plaintiff, a reversal with directions to enter judgment for the defendant is proper. . . . [¶] . . . [A] reversal of a judgment for the plaintiff based on insufficiency of the evidence should place the parties, at most, in the position they were in after all the evidence was in and both sides had rested." ' "

(*Acqua Vista Homeowners Assn.*, *supra*, at p. 1161, quoting *Frank*, *supra*, at p. 833.)

Arrabito had a full and fair opportunity to present his case. In particular, he was free to present evidence with respect to the value of BNS as of the date that Santee Saloon obtained BNS's assets via the lien sale.²¹ However, Arrabito failed to present any such evidence. In particular, Arrabito did not present any expert testimony as to BNS's value. Thus, Yip's testimony that BNS had no value as of the date of the lien sale was uncontradicted. Under these circumstances, a reversal with directions to enter

²¹ As noted in part I, *ante*, we assume for purposes of this decision that the trial court's finding that Chaffin breached his fiduciary duties to Arrabito by effectuating the lien sale is supported by substantial evidence.

judgment for appellants is proper. (*Acqua Vista Homeowners Assn., supra*,
7 Cal.App.5th at p. 1161.)

IV.

DISPOSITION

The judgment against Chaffin and Santee Saloon is reversed. The matter is remanded to the trial court with directions to enter judgment in favor of Chaffin and Santee Saloon and to conduct any other necessary ancillary proceedings. Chaffin and Santee Saloon are entitled to costs on appeal.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.